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No. 94-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

J. DON ADAMS, et al.,
Petitioners,

RICHARD C. BECHERER, et al.,
Plaintiffs/Respondents,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
Defendants/Respondents.

BRIEF OF LEHILL PARTNERS, L.P. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether review by this Court of the Sixth Circuit's (implicit) holding that the district court had *in personam* jurisdiction over petitioners is inappropriate, given that: (a) facts already in the record support this conclusion and the proceedings on remand may reveal additional facts pertinent to this issue, rendering review at this time premature; (b) the Sixth Circuit's holding does not involve important questions of federal law; and (c) the Sixth Circuit's holding does not conflict with well-established precedent.

II.

Whether review by this Court of the Sixth Circuit's holding that the doctrine of virtual representation may be a viable means of barring petitioners from relitigating claims already resolved by the district court is inappropriate, given that: (a) facts already in the records support this conclusion and the proceedings on remand may reveal additional facts pertinent to this issue, rendering review at this time premature; (b) the Sixth Circuit's holding does not involve important questions of federal law; and (c) the Sixth Circuit's holding does not conflict with well-established precedent.

III.

Whether review by this Court of the Sixth Circuit's failure to hold that the district court could not issue an injunction under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, is inappropriate, given that: (a) the Sixth Circuit vacated the injunction, and the district court may decide on remand not to reissue it, rendering review at this time premature; (b) the Sixth Circuit's holding does not involve important questions of federal law; and (c) the Sixth Circuit's holding does not conflict with well-established precedent.

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SUMMARY OF THE ARGUMENT

Petitioners raise several issues which they assert this Court should review. These issues are:[1]

1. The Sixth Circuit's (implicit) holding that the district court properly exercised *in personam* jurisdiction over petitioners with respect to their fraud and securities claims.

2. The Sixth Circuit's holding that the doctrine of virtual representation may be a viable means of barring petitioners from relitigating claims already resolved by the district court.

3. The Sixth Circuit's failure to hold that the district court could not issue an injunction under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283.

These issues are not appropriate for review, for the following reasons:

1. The Sixth Circuit has remanded this case to the district court for factual findings to determine the extent of petitioners' involvement in the litigation before the district court. The extent of petitioners' involvement in that litigation is relevant to the determination of the existence of both personal jurisdiction and virtual representation.[2] No decision has been issued by the district court because the Sixth Circuit stayed remand proceedings pending the outcome of this petition. Until the district court makes these findings, review by this Court is premature. Furthermore, the record reveals that the district court properly exercised *in personam* jurisdiction over petitioners, as

[1]Petitioners also request review of the Sixth Circuit's failure to vacate the "Gag Order" entered by the district court. As that issue does not concern this respondent, it is not addressed herein.

[2]Respondent maintains, however, that no further factual findings are necessary to support the district court's excercise of *in personam* jurisdiction over petitioners, as is set forth *infra*.

they consented to submit to the court's jurisdiction when they opted-in as plaintiffs in the Fed.R.Civ.P. 23(b) class certified by that court.

2. The test for virtual representation, as enunciated by the Sixth Circuit, is in keeping with generally accepted principles of law. Furthermore, until the proceedings on remand are concluded, review is premature, as the district court may determine that the facts do not support a finding of virtual representation, thereby mooting petitioners' petition. Finally, the Sixth Circuit was correct in holding that the factual record to date demonstrates that petitioners may be precluded from future litigation under the doctrine of virtual representation.

3. The Sixth Circuit vacated the district court's injunction, holding that the injunction could only issue should the remand proceedings reveal that petitioners were virtually represented in the district court litigation. Until the remand proceedings are concluded, review of this issue is premature, as the district court may determine that no virtual representation existed and may refuse to reissue the injunction, in which case petitioners' petition will be mooted.

STATEMENT OF THE CASE

On August 12, 1989, six individuals ("the named plaintiffs") commenced this action in the United States District Court for the Eastern District of Michigan, as a proposed Fed.R.Civ.P. 23(b)(3) class action. The named plaintiffs, and the class members they sought to represent, were investors (the "Unit Owners") in The Registry Hotel at Pelican Bay (the "Hotel"), a resort hotel in Naples, Florida. The Unit Owners had each purchased individual interests in the Hotel, consisting of fee simple ownership of a hotel unit, an interest in the common areas of the Hotel, and the right to share proportionately in all profits generated by the Hotel's commercial areas. Each Unit Owner is a member of the Association of Unit Owners of the Registry Hotel at Pelican Bay, Inc. ("AUO"), a condominium association.

The named plaintiffs' complaint alleged various claims, including securities fraud violations, common law fraud, breach of contract, and federal and state RICO violations. The defendants included: the Hotel's developer, Shelter Seagate Corporation ("SSG"), and individuals and entities affiliated with SSG; Merrill Lynch, Pierce, Fenner & Smith, which had marketed the investment; Dominion Financial & Investment Corp. (which changed its name to Trustbank Mortgage Center, Inc. ("Trustbank")), a subsidiary of the savings and loan that provided first mortgage loans to finance the Unit Owners' purchases; an accounting firm; and the architectural firm and general contractor involved in the Hotel's construction. Respondent LeHill Partners, L.P. has succeeded to Trustbank's rights with respect to the mortgage loans, and has been substituted as a party by order of the Sixth Circuit dated May 8, 1995. LeHill acquired its interest from the Resolution Trust Corporation ("RTC"), which had taken over Trustbank's position after the insolvency of Trustbank's parent institution.

On March 15, 1991, the district court certified a Rule 23(b)(3) plaintiff class ("the contract class") with respect to the breach of contract claims asserted against SSG. In accordance with the requirements of Rule 23, notice of the pendency of the

class action was sent out to all Unit Owners, including petitioners. All of the petitioners opted to be included as plaintiffs in the litigation. A bench trial was held on the contract claims, and the Unit Owners were awarded a judgment for $6.7 million against SSG.

Before and during the pendency of this case, a number of Unit Owners went into default on their mortgage loans. Many of them deliberately withheld loan payments in an attempt to pressure Trustbank into a settlement. The president of the AUO actively encouraged this tactic. Virtually all of the petitioners herein currently remain in default on their loans.

Trustbank commenced foreclosure actions in Florida state court in response to the loan defaults. In defending against foreclosure, a number of the Unit Owners, including many of the petitioners, filed counterclaims mirroring the allegations and charges of the complaint in this action. Those Unit Owners then argued to the Florida courts that foreclosure should be stayed until the district court in this action adjudicated the matters common to the complaint herein and the Florida counterclaims.

Petitioner Dick Dykes spearheaded this tactic by the Unit Owners in foreclosure. Petitioners' co-counsel, Thomas R. Grady, represented Mr. Dykes in the foreclosure. The named plaintiffs' attorney, Elwood Simon, appeared as "of counsel" on papers Mr. Grady filed in the foreclosure. In those papers, Mr. Grady sought to stay the foreclosure by arguing, *inter alia:*

> ***A stay is particularly appropriate where, as here, the outcome of the Class Action Lawsuit (in which TrustBank is a defendant) would have res judicata effect on the Counterclaim and Affirmative Defenses of the Defendant [i.e. Mr. Dykes].*** The test for staying a cause of action pending simultaneously with another action instituted in a separate court is that the " . . . identity of the matters involved must be such that a judgment in the first suit could be pleaded in bar as a former adjudication." *Horter v. Commercial Bank &*

> *Trust,* 126 So. 909, 912 (Fla. 1930). ***Any judgment in the Class Action Lawsuit will act as an estoppel to Trustbank and the Defendant from litigating issues common to both causes of action which are actually litigated and decided in the prior action.***

(Defendant's Response to Plaintiff's Motion to Sever and Stay Affirmative Defenses and Counterclaim and Supporting Memorandum of Law, Appendix hereto, at 8a.) (emphases added)[3]

Mr. Grady's arguments ultimately carried the day. Although the Florida trial court refused to stay foreclosure, the Florida Second District Court of Appeal reversed and stayed the foreclosure against Mr. Dykes pending the outcome of this case. *Dykes v. Trustbank Savings F.S.B.,* 567 So.2d 958 (Fla. Ct. App. 1990). In its opinion, the Florida Court of Appeal held, in part:

> While we sympathize with respondent's contention that a stay of the foreclosure action will force it to wait until after the federal action is decided in order to "pursue its collateral," i.e. title to the hotel units, this consideration cannot be determinative of our resolution of this matter.

Id. at 959-60.

The issues in this case relating to the mortgage loans were decided on August 7, 1992 when the district court issued its opinion and order granting motions for summary judgment of various defendants, including Trustbank, which by that point was subject to conservatorship by the RTC. *Becherer v. Merril Lynch, Pierce Fenner & Smith,* 799 F.Supp. 755 (E.D.Mich. 1992). With respect to Trustbank, the district court held that the doctrine this Court established in *D'Oench Duhme & Co. v. FDIC,* 315 U.S. 477 (1942) barred all claims challenging the validity of the mortgage loans. The district court also ruled that the fraud and securities fraud claims against Trustbank should be dismissed because reliance could not be shown and Trustbank's allegedly

[3]These papers have not yet become part of the record due to the Sixth Circuit's stay of the proceedings on remand. If and when those proceedings are renewed, the factual record from the foreclosures will be fully developed.

fraudulent actions had not been undertaken "in connection with" a sale of securities. *Id.* at 772-75.

After the district court had issued its final opinion, petitioners, represented by attorney Thomas Grady, attempted to bring their fraud and securities claims against Merrill Lynch in Florida state court, although those claims had already been decided by the district court. Merrill Lynch moved the district court to enjoin petitioners' state court proceedings.

On November 24, 1992, the district court held, *inter alia,* that petitioners were bound, under the doctrines of res judicata and collateral estoppel, by the findings of fact and conclusions of law set forth in its August 7, 1992 opinion. *Becherer v. Merrill, Lynch, Pierce, Fenner & Smith*, 809 F. Supp 1259, 1269 (E.D.Mich. 1992). Specifically, the district court held that petitioners were bound by the court's judgment because petitioners were parties in the case, were in privity with the named plaintiffs and were adequately represented by them — an accepted standard for application of res judicata and collateral estoppel. On December 17, 1992, the district court issued an injunction barring petitioners from relitigating against Merrill Lynch, in any forum, the claims and issues previously ruled upon and decided by the district court.

Petitioners appealed the district court's decision. On appeal, the Sixth Circuit recognized the doctrine of adequate representation ("virtual representation") as a viable means of invoking the bars of res judicata and collateral estoppel. *Becherer v. Merrill, Lynch, Pierce, Fenner & Smith*, 43 F.3d 1054, 1069-70 (6th Cir. 1995). However, the Sixth Circuit determined that the district court had incorrectly enunciated the criteria for virtual representation, that a more stringent test should have been used, and therefore vacated the district court's injunction. Finally, the Sixth Circuit held that, as there were indicia that petitioners may indeed have been "virtually represented" by the named plaintiffs under the narrower test, the district court should, on remand, make findings of fact on that issue. Before that issue could be

resolved, the Sixth Circuit stayed the district court proceedings pending the outcome of the instant petition.[4]

Petitioners now seek review of the Sixth Circuit's implicit holding that that the district court properly exercised personal jurisdiction over them. They maintain that the district court never obtained jurisdiction over them, and that personal jurisdiction is a prerequisite for the application of the doctrine of virtual representation. They also argue that this alleged jurisdictional defect vitiates the district court's efforts to enjoin them from future litigation of already-decided issues. Petitioners further argue that the Sixth Circuit incorrectly held that, depending on the district court's factual findings on remand, their case might be an appropriate one for application of the doctrine of virtual representation.

Petitioners' petition should be denied. The district court has not resolved the issue of whether petitioners were virtually represented by the named plaintiffs, and whether they are therefore barred from future litigation and arbitration of already-decided issues. As petitioners' rights have not yet been conclusively affected because no final decision has been issued, petitioners lack standing to request review of the Sixth Circuit's opinion. Furthermore, to the extent that discovery is propounded on remand concerning the issue of virtual representation, that discovery will also be relevant to the issue of personal jurisdiction, as there are elements common to both. Until those factual findings have been made, review by this Court is premature. Finally, the Sixth Circuit's implicit holding regarding jurisdiction, and its express holding regarding virtual representation, do not conflict with established precedent, and do not involve important questions of federal law.

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[4]The Sixth Circuit also upheld the district court's dismissal of the claims against Trustbank/RTC. Neither petitioners nor the named plaintiffs have sought further review of that ruling.

ARGUMENT

I.

THE SIXTH CIRCUIT'S IMPLICIT HOLDING THAT THE DISTRICT COURT CORRECTLY EXERCISED *IN PERSONAM* JURISDICTION OVER PETITIONERS IS INAPPROPRIATE FOR REVIEW BY THIS COURT.

A. Review of this issue would be premature and would not resolve important questions of federal law.

This Court should refuse to review the Sixth Circuit's implicit holding that the district court properly exercised *in personam* jurisdiction over petitioners. Review of this issue is premature, as the proceedings on remand may reveal additional facts relevant to the determination of personal jurisdiction. *Carden v. Arkoma Associates,* 494 U.S. 185, 197, 110 S.Ct. 1015 (1990). Furthermore, the unique factual circumstances of this litigation render it unsuitable for review, as any rules of law established will be so fact-specific that they will not be of general public importance. *See* S.Ct.R. 10.1.

B. The Sixth Circuit's holding is in keeping with established law.

Most importantly, the Sixth Circuit's holding does not conflict with the holdings of this Court or any other court of appeals. The law on personal jurisdiction is well-developed and unambiguous. There are three means through which a court may obtain jurisdiction over a person: that person's presence in the forum state; the existence of "minimum contacts" between the person and the forum state; or the person's consent to submit to the jurisdiction of the court. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154 (1945). Where personal jurisdiction is premised upon "minimum contacts" between the person and the forum state, those contacts must be such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Id.* at 316.

Where a class action is involved, a court may obtain jurisdiction over non-resident plaintiffs lacking minimum contacts with the forum state through Fed.R.Civ.P. 23's notice and opt-out provisions. *Phillips Petroleum v. Shutts,* 472 U.S. 797, 811, 105 S.Ct. 2965 (1985). By providing an absent plaintiff with notice of the class action and the opportunity to opt-out of the proceedings, a court in effect invites an absent plaintiff to consent to the court's jurisdiction. If a properly notified plaintiff elects not to opt-out of the proceedings, that plaintiff will be bound by the final judgment. *Id.* at 808. This Court has held that such a means of obtaining jurisdiction over, and binding, an absent plaintiff satisfies the constitutional requirement of procedural due process. *Id.* at 812.

1. *Petitioners consented to be subject to the jurisdiction of the district court.*

There is no question that petitioners voluntarily submitted to the jurisdiction of the district court. Petitioners were informed, by notice dated March 22, 1991, of the pendency of the class action on their contract claims, and their right to opt-out of the proceedings. (*See* Appendix F to petitioners' petition). Petitioners elected not to opt-out, and as such consented to be parties to the class action and to submit to the court's jurisdiction. Petitioners participated in the bench trial on those claims. Pursuant to the class action resolution of their contract claims, petitioners obtained a judgment of $6.7 million. Petitioners do not object to being bound by this judgment, and do not dispute the court's jurisdiction over them for those claims on which petitioners have been victorious. Rather, petitioners object to the court's exercise of jurisdiction over them on those remaining securities and fraud claims which were decided unfavorably to petitioners.[5]

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[5]The unfairness of petitioners' apparent attempt to have their cake and eat it, too was observed by the district court:

> As Merrill Lynch properly points out, the Florida plaintiffs cannot claim that this court has personal jurisdiction over them in order to collect the $6.7 million judgment from SSG, of which they are the recipients as members of the plaintiff contract case, and then turn around and say that this court does not have personal jurisdiction over them with respect to the other issues of the case.

Opinion and Order, Appendix B to petitioners' petition, at 21b.

Petitioners hinge their argument on the fact that, when the district court attempted to work a global settlement of the securities and fraud claims, and to that end conditionally certified a settlement class, certain of the petitioners elected to opt-out of the settlement class. As it turned out, the attempt at global settlement failed, and the district court ultimately dismissed all remaining claims on summary judgment. Petitioners, not pleased with this result, now argue that, by opting out of the proposed settlement class, petitioners were somehow able to divest this court of the *in personam* jurisdiction which it had already obtained over petitioners by way of their willing inclusion in the previously certified contract class.

Petitioners also argue that, as a class was never formally certified with respect to the securities and fraud claims, the court lacked personal jurisdiction over them with respect to those claims, and they are therefore not bound by the court's grant of summary judgment against petitioners on those claims. Petitioners' continued protestations that they were not members of a class with respect to the fraud and securities claims are red herrings. Although the class action mechanism is a means through which a court may obtain personal jurisdiction over plaintiffs lacking minimum contact with the forum, and thereby bind absent parties, **the district court did not rely on the failed settlement class action to obtain jurisdiction over petitioners, nor to bind them to the results of the judgment.**[6] The district court obtained

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[6]Although the district court did not rely on the class action mechanism to bind the petitioners with respect to their fraud and securities claims, a colorable argument can be made that it would have been proper to do so. The district court found that all parties tacitly agreed to try these issues as a class. In fact, in March, 1991 the named plaintiffs moved to certify such a class, and the district court explains that that motion "was not denied by me. In hearings resolving these issues in June and July of 1992, no party raised the need to again certify a class." (Opinion and Order, Appendix B to petitioners' petition, at 11b). Where a class is never formally certified, non-parties may nevertheless be bound by the final judgment if the case is "treated" by those involved as a class action. *See, e.g., Jackson v. Hayakawa,* 605 F.2d 1121 (1979), *cert denied,* 445 U.S. 952 (1980).

personal jurisdiction over petitioners when they consented to become members of the contract class, which class was properly certified. Petitioners are bound by the judgment dismissing their fraud and securities claims not because they were putative members of any failed settlement class, but because they were virtually represented by the named plaintiffs.

2. *The district court obtained* in personam *jurisdiction over petitioners with respect to all of their claims when they voluntarily became parties to the contract class action.*

Petitioners have cited no authority to the effect that they can, at will, limit a court's exercise of personal jurisdiction over them to the claims which petitioners feel it is most advantageous for them to have tried in that forum. Allowing petitioners to thusly divide their claims up between courts would encourage forum shopping in the extreme.

Despite the overwhelming evidence that all involved — parties, counsel and court — tacitly agreed to try the fraud and securities claims as a class action to which petitioners were parties, petitioners claim, nevertheless, that "The district court *never* notified Petitioners that their claims against Merrill Lynch would be adjudicated." (Petitioners' Petition, at 20). This is patently untrue: the district court sent the petitioners a notice of proposed settlement and conditional class action certification which clearly explained that:

> If the Settlement is not approved, the conditional certification is void ***and the case will proceed in Court*** as if there had been no settlement proposal or conditional certification. If you exclude yourself from the Settlement and are a member of the Class certified in March, 1991, your case will continue before this Court.

See Notice of Proposed Settlement and Conditional Class Action Certification, Appendix G to petitioners' petition, at 5g) (emphasis added).

Petitioners have quoted out of context the court's language that "you will have to retain your attorney and file your own suit, at your own expense." (*Id.* at 14g). That language was included in a discussion of what would happen to opt-outs of the settlement class *if the settlement was approved.* The notice was clear that, if the settlement fell through, even opt-outs of the settlement class would remain before the court on their fraud and securities claims. (*Id.* at 5g).

The law is clear that, once a party has submitted to the jurisdiction of the court for one claim, that court has jurisdiction over the party with respect to all claims. The petitioners' submission to the jurisdiction of the court with respect to their contract claims, and their litigation of those claims before that court, comprise sufficient "minimum contacts" with the forum state that the court's exercise of jurisdiction with respect to petitioners' other claims "does not offend traditional notions of fair play and substantial justice." *International Shoe,* at 316. As this Court has held, the requirements of due process are satisfied when a party purposefully avails itself of the privileges of conducting activities within the forum state such that it would reasonably expect to be haled into court there. *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1979); *Hanson v. Denckla,* 357 U.S. 235, 253 (1958).

For example, in *Adam v. Saenger,* 303 U.S. 59 (1930), this Court held:

> The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff.

Id. at 67-68.

This issue was addressed more recently in *Huff v. Pharr,* 748 F.2d 1553 (11th Cir. 1984), wherein the Eleventh Circuit upheld a California state court's exercise of jurisdiction over a defendant solely based on the defendant's involvement, many years earlier, in related litigation before that court. In that case, defendant was a Florida resident who was sued in 1972 in California state court. At the time of the 1972 suit, defendant possessed sufficient minimum contacts with the state of California to support *in personam* jurisdiction. Defendant fully litigated the matter, including a counterclaim against plaintiff and an appeal of an

adverse judgment to a higher state court. Ultimately defendant lost the case and judgment was entered against him, but defendant failed to pay that judgment. In 1982, plaintiff returned to the California state court and sued to renew the earlier judgment, and upon defendant's failure to defend a new final judgment was entered against him.

The Eleventh Circuit upheld the California court's exercise of jurisdiction over the defendant in the suit to renew the judgment, despite the fact that the defendant had not had any contacts with the forum state since the last suit. The Eleventh Circuit held that, as the defendant had "purposefully availed himself of the privilege of litigating in California's state courts by filing a counterclaim in [the earlier] action and appealing the adverse judgment," and as the defendant had previously been subject to the jurisdiction of the California court, it was not unfair to require the defendant to submit to the court's jurisdiction in the later suit. *Id.* at 1555. *See also General Contracting & Trading v. Interpole,* 940 F.2d 20 (1st Cir. 1991); *Irving Trust Co. v. Nationwide Leisure Corp.,* 562 F.Supp. 960, 961 (S.D.N.Y. 1982); *Dewey v. Almy Chemical Co.,* 25 F.Supp. 1021, 1022 (E.D.N.Y. 1939).

The rationale of *Adam* and *Huff* supports the conclusion that the district court in the instant case properly excercised jurisdiction over the petitioners with respect to their fraud and securities claims. Once the petitioners had consented to the jurisdiction of the court on the contract issues, the court then had jurisdiction to decide all of petitioners' related claims before it. Having consented to participate in the class action, the petitioners could not escape the court's jurisdiction to decide the remaining claims any more than if they had accepted service of process in the state. Furthermore, petitioners' wholehearted participation in the litigation of the contract issues provided sufficient minimum contacts between them and the forum state for the court to excercise *in personam* jurisdiction over petitioners regarding the remainder of their claims.

3. ***The district court had jurisdiction over petitioners with respect to their fraud and securities claims because petitioners acted as if they were parties and impliedly consented to the court's exercise of jurisdiction.***

A second reason the district court was justified in exercising jurisdiction over petitioners with respect to their fraud and securities claims is that petitioners' impliedly consented to letting the district court decide these claims. In other words, the district court had personal jurisdiction over petitioners independent of their inclusion in the contract class. As the district court explained:

> As stated hereinbefore, when settlement failed, I decided the remaining matters before me such as the contentions of the parties regarding the breach of contract claim and motions for summary judgment on, or dismissal of, plaintiffs' fraud claims. ***At no point did plaintiffs' counsel claim that the rulings to be made by me on those matters would only bind the named plaintiffs. All parties in the several hearings proceeded on the basis that my decisions would bind all investors.***

(*See* Opinion and Order, Appendix B to petitioners' petition, at 9b) (footnote omitted) (emphasis added).

Petitioners actively and willingly participated in the litigation of the securities and fraud claims. Papers were filed on their behalf, presumably with their consent[7], and when motions were argued, it was, as the district court found, "clear[ly] . . . on behalf of all investors." (*Id.* at 10b). Such participation in the litigation

[7]*See* Plaintiffs' Memorandum of Law in Support of Their Motion to Enjoin Merrill Lynch's Unilateral Solicitation of Settlements With Investors, dated October 1, 1992, at 3-4. In this motion, counsel for the class asked the district court to enjoin Merrill Lynch and the RTC from settling claims with any individual Unit Owners.

of an issue creates the presumption of consent to the court's jurisdiction:

> [A] party should be deemed to consent to personal jurisdiction if it actually litigates the adequacy of representation issue before the district court, or the underlying merits of the class action, because in such a case the party has shown a willingness to engage in extensive litigation in the forum.

In re Real Estate Title and Settlement Serv. Antitrust Lit., 869 F.2d 760, 771 (3d Cir. 1989), *cert denied*, 493 U.S. 959 (1989); *see also Irving Trust Co. v. Nationwide Leisure Corp.*, 562 F.Supp. 960, 961 (S.D.N.Y. 1982) ("The fact remains that Capitol 'has acted like a party on each occasion that it was strategically useful to act like a party and it has never sought to be dismissed as a party.'") .

Furthermore, petitioners fully expected that the court's decision would be dispositive of their fraud and securities claims. In the foreclosure proceedings taking place in Florida, petitioner Dykes, among others, argued that those actions should be stayed pending the outcome of the Michigan proceedings, as the Michigan action would conclusively resolve issues implicated in the foreclosures. (*See* Defendant's Response to Plaintiff's Motion to Sever and Stay Affirmative Defenses and Counterclaim and Supporting Memorandum of Law, Appendix hereto.) As described *supra,* the Florida Court of Appeal agreed with that position. Obviously, petitioners at that time presumed that the district court had jurisdiction to decide their claims. It was not until those claims were unfavorably resolved that petitioners decided they no longer wanted the court to exercise jurisdiction over them. Unfortunately for petitioners, at that point it was too late to make that decision.

As is clear from the above discussion, the district court was justified in exercising personal jurisdiction over petitioners with respect to their fraud and securities claims as: (1) petitioners consented to the court's jurisdiction for all claims in the case by

not opting-out of the contract class action; (2) assuming petitioners *could* limit their consent to the court's jurisdiction to the contract claims, petitioners' participation in the contract class action provided "minimum contacts" with the forum justifying the court's exercise of jurisdiction over petitioners' fraud and securities claims; and (3) petitioners participated in the litigation of the fraud and securities claims, and impliedly acted as if they were members of a class on those issues, thereby consenting to the court's jurisdiction regarding those claims.

II.

THE SIXTH CIRCUIT'S HOLDING THAT THERE WERE INDICIA THAT PETITIONERS WERE VIRTUALLY REPRESENTED BY THE NAMED PLAINTIFFS WITH RESPECT TO THEIR FRAUD AND SECURITIES CLAIMS IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

A. Review of this issue would be premature, and would not resolve important questions of federal law.

Petitioners challenge the Sixth Circuit's holdings regarding virtual representation on two grounds. First, they argue that the Sixth Circuit incorrectly held that the doctrine of virtual representation is a substitute for *in personam* jurisdiction. Second, they argue that non-parties cannot be bound by a judgment under a theory of virtual representation where those non-parties are ascertained, identified individuals. These issues are not appropriate for review as the factual record is not fully developed enough to warrant review at this time. Furthermore, the unique facts of this case render it a poor candidate for review, as the issues involved are not of general public importance.

B. The Sixth Circuit did not deviate from accepted precedent or violate petitioners' constitutional right to due process.

1. The Sixth Circuit did not hold that virtual representation is a substitute for personal jurisdiction.

Contrary to petitioners' assertions, the Sixth Circuit did not hold that virtual representation is a substitute for personal jurisdiction. Rather, the Sixth Circuit held that, even though petitioners had not been afforded a formal opportunity to opt-out of the district court's proceedings with respect to the fraud and securities claims, petitioners were nevertheless bound by the result because of their virtual representation by the named plaintiffs. However, the mere fact that petitioners were not afforded a formal opportunity to opt-out with respect to the fraud and securities claims does not mean that the district court did not obtain personal jurisdiction over petitioners through other means. As was previously discussed, petitioners were invited to opt-out of the case early in the litigation, and elected instead to submit to the district court's jurisdiction. That having been established, it was not necessary for the district court to *again* obtain jurisdiction over petitioners for the remainder of the issues in the case. Although the Sixth Circuit did not expressly address this issue, it is clear that it did not hold that the district court could invoke the doctrine of virtual representation as a substitute for *in personam* jurisdiction.

2. The Sixth Circuit correctly enunciated the test for virtual representation, and correctly held that the factual developments to date suggested that petitioners may be barred from pursuing their fraud and securities claims under that doctrine.

Petitioners have argued that it is inappropriate to invoke the doctrine of virtual representation where the non-parties sought to be bound are identified, ascertained individuals. In support of this proposition, petitioners argue that the doctrine originated in the area of wills and estates to prevent unknown, unascertained or unborn persons from disturbing final judgments through assertion

of future interests. Whatever the genesis of the doctrine may have been, there is no doubt that it has evolved a long way since the 1915 case which petitioners cite to support their contention that the doctrine "will not be applied where the representation relied on does not appear to have been . . . necessary." *Pugh v. Frierson*, 221 F. 513, 524 (6th Cir. 1915).

As the Sixth Circuit correctly noted in the instant case, the doctrine of virtual representation is a means whereby a non-party may be bound by a judgment under a theory of res judicata or collateral estoppel. *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84 (5th Cir. 1977). The Sixth Circuit held that a non-party may be bound by a judgment "'in special circumstances that make relitigation especially unattractive. . . . Close nonlitigating relationships with a party, participation, apparent acquiescence, and perhaps deliberate maneuvering to avoid the effects of the first action are among the factors to be weighed.'" (Sixth Circuit opinion, Appendix A to petitioners' petition, at 31a, *citing* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure §4457 (1981)).

The authority on point reveals that the Sixth Circuit correctly enunciated this test, and that the modern doctrine of virtual representation (as opposed to the infant doctrine which related to wills and estates) does not require any inability to identify or ascertain the non-parties. For example, in *General Foods Corp. v. Massachusetts Department of Public Health,* 648 F.2d 784 (1st Cir. 1981), General Foods was barred by the doctrine of res judicata from challenging the constitutionality of defendant's regulations, as those regulations had been held constitutional in an earlier suit to which General Foods had not been a party. However, plaintiffs in the earlier suit were two trade associations of which General Foods was a member, and General Foods helped fund that suit. In holding that General Foods was bound by the judgment in the first suit, the First Circuit held:

> [A] non-party [may not be] bound by an *in personam* judgment unless in the underlying litigation he had directly or vicariously a full and fair opportunity to

> present evidence and argument. . . . [A] person who is not a party to an action but who expressly or impliedly gives a party authority to represent him may be bound by the rule of res judicata as though he were a party. . . . [T]he person so represented has had a vicarious opportunity to be heard in the underlying litigation.
>
> In the instant case we need not consider whether merely by becoming a member of the two trade associations . . . General Foods impliedly invested each of them with authority to bring on behalf of its members litigation. . . . ***Here more is involved than the mere membership in a trade association. General Foods, at the request of [the Association] contributed $2,500 toward the expenses of the . . . litigation in the Massachusetts courts . . . [A] member of a trade association who finances an action which it brings on behalf of its members impliedly authorizes the trade association to represent him in that action.*** It is of no significance if a member declines to intervene in the litigation in his own name.

Id. at 787-778 (emphasis added).

As can be seen from the holding in *General Foods,* the inability to identify or ascertain non-parties is not a prerequisite to the application of the doctrine of virtual representation. To the contrary, the fact that the petitioners are easily identified militates toward the invocation of the doctrine, as the ease with which they can be identified stems from their active participation in, and manipulation of, the litigation from behind-the-scenes.

The facts developed to date suggest that this is a paradigm case for application of the doctrine of virtual representation. Petitioners are members of the AUO, which was actively involved in selecting class counsel and financing prosecution of the class action. As part of the strategy to resolve their disputes with defendants, the AUO persuaded a substantial number of its members, including many of the petitioners, to withhold the

mortgage payments on their condominium units. In this regard, petitioners clearly engaged in "deliberate maneuvering to avoid the effects of the first action", which was enunciated by the Sixth Circuit as a basis for finding virtual representation. Petitioners' co-counsel, on behalf of a number of his clients, sought and achieved a stay of foreclosure by arguing this action would resolve, under the doctrine of res judicata, the defenses they had raised to enforcement of their mortgage loans. Equity and principles of judicial economy now fully support holding petitioners' counsel to his word and applying the bar of virtual representation.

Based on petitioners' involvement as parties in the bench trial on the contract claims, and their behind-the-scenes manipulation of the litigation concerning the fraud and securities claims, the Sixth Circuit was justified in holding that further factual inquiry into the issue of virtual representation is warranted.

III.

THE SIXTH CIRCUIT'S FAILURE TO HOLD THAT THE DISTRICT COURT COULD NOT ISSUE AN INJUNCTION UNDER THE RELITIGATION EXCEPTION TO THE ANTI-INJUNCTION ACT IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

A. Review of this issue would be premature, and would not resolve important questions of federal law.

The injunction issued by the district court pursuant to the relitigation exception to the Anti-Injunction Act, 28 U.S.C. §2283, was vacated by the Sixth Circuit, as the Sixth Circuit held that the injunction could only issue should the remand proceedings reveal that petitioners were virtually represented in the district court litigation. Until the remand proceedings are concluded, review of this issue is premature, as the district court may determine that no virtual representation existed and may refuse to reissue the injunction, in which case petitioners' petition will be mooted. Furthermore, facts may be revealed on remand which

would bear on the propriety of the injunction, rendering review at this time premature.

B. The Sixth Circuit did not hold that the Anti-Injunction Act excuses the requirement that a court must have personal jurisdiction over the person that it seeks to enjoin, and therefore its holding is in keeping with established law.

Petitioners maintain that the Sixth Circuit implicitly held that, pursuant to the Anti-Injunction Act, a court may enjoin a person over which it does not have jurisdiction. However, this is clearly not the Sixth Circuit's holding. As is discussed *supra*, the district court clearly had *in personam* jurisdiction over petitioners. As such, the Sixth Circuit's failure to prohibit the district court from reissuing the injunction was not based on the reasoning that personal jurisdiction was not a necessary prerequisite to such an injunction.

Petitioners cite *Carlough v. Amchem Products*, 10 F.3d 189 (3d Cir. 1993) in support of their contention that the Sixth Circuit's holding was somehow erroneous. However, the Sixth Circuit's holding was entirely in keeping with *Carlough*. In that case, a class action was filed on behalf of persons exposed to certain asbestos-containing products manufactured by defendants. The court conditionally certified the class, but before notice was sent to putative plaintiffs regarding the pendency of the class action and of their right to opt-out, the district court issued a preliminary injunction under the relitigation exception to the Anti-Injunction Act, prohibiting a group of out-of-state individuals from pursuing duplicative actions. On appeal, the Third Circuit held that the district court was not authorized to enjoin the state court damages suit because it lacked personal jurisdiction over the absent plaintiffs:

> [The absent] plaintiffs had not received notice of the [class action] proceedings prior to the motions to enjoin their state court actions. Although an inference of consent might have been drawn from silence or inaction

> after notice and the running of the opt out period, we find no precedent for assuming consent prior to notice and the commencement of the opt out period. ***Thus, with neither express nor inferred consent, nor minimum contacts, and prior to notice and the commencement of the opt out period, the district court did not have personal jurisdiction over the [absent] plaintiffs and did not have authority to bind their actions when it issued the injunction. In short, the district court's pre-notice, pre-opt out period injunction was premature.***

Id. at 200 (citations and footnote omitted) (emphasis added).

It is clear that the facts of *Carlough* are easily distinguishable from the instant case. In *Carlough*, the district court attempted to issue an injunction prior to obtaining jurisdiction over the absent plaintiffs. However, had the court waited until after the notice had been sent, and after the opt-out period had run, the issuance of the injunction would have been upheld. "[O]nce the district court approved the dissemination of notice and commenced the opt out period . . . the jurisdictional problem was resolved." *Id.* at 201. Therefore, the Sixth Circuit's holding in the instant case is entirely in keeping with the holding in *Carlough:* as the district court in the instant case had obtained jurisdiction over petitioners far in advance of the issuance of the injunction, there was no violation of petitioners' due process rights.[8]

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[8]In re *Real Estate Title and Settlement Services Litigation,* 869 F.2d 760 (3d Cir. 1989), which petitioners also cite, can be similarly distinguished.

CONCLUSION

The Sixth Circuit's holdings are not appropriate for review by this Court. Until the proceedings on remand have been concluded, and the record thereby sufficiently developed, review of these issues would be premature. Furthermore, the Sixth Circuit's holdings do not conflict with well-established precedent, nor do they implicate important questions of federal law. Accordingly, respondent respectfully requests that this Court deny petitioners' petition.

Respectfully submitted,

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No. 94-1968

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

J. DON ADAMS, et al.,
Petitioners,

RICHARD C. BECHERER, et al.,
Plaintiffs/Respondents,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
Defendants/Respondents.

APPENDIX

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IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR COLLIER COUNTY, FLORIDA CIVIL DIVISION

DOMINION FEDERAL SAVINGS AND LOAN ASSOCIATION, N/K/A TRUSTBANK SAVINGS, F.S.B.,

Plaintiff,

v

DICK DYKES, et al.,

Defendants.

Case No. 89-2467 (CA-01)

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION TO SEVER AND STAY AFFIRMATIVE DEFENSES AND COUNTERCLAIM AND SUPPORTING MEMORANDUM OF LAW

Dominion Federal Savings & Loan Association n/k/a TrustBank Savings, F.S.B. ("TrustBank") has filed a Motion to Sever and Stay Affirmative Defenses and Counterclaim (the "Motion to Sever and Stay") as raised by Dick Dykes (the "Defendant"). The Motion to Sever the Affirmative Defenses of the Defendant must be denied in that the issues raised by the Defendant are inextricably linked to the question of TrustBank's claim of ownership of any note or mortgage and its right to foreclose any such mortgage which purportedly encumbers real property owned by the Defendant. The Defendant does not object to the severance of the Counterclaim in that the Counterclaim was brought by the Defendant as a compulsory counterclaim as required by Rule 1.170(a), Fla.R.Civ.P., and in order avoid its falling outside of applicable limitation periods.

However, Defendant vigorously objects to the severance of its Affirmative Defenses. Such a severance would in essence preclude Defendant from denying the validity of the note and mortgage purportedly held by TrustBank and would impermissibly shift the burden currently imposed on TrustBank of proving its right to foreclose its purported mortgage. Assuming that TrustBank carries its burden of proof in establishing its right to foreclose the note and mortgage which it purportedly holds, the Defendant must then have the right to challenge the validity of that note and mortgage through affirmative, equitable and other defenses. Severing the Affirmative Defenses would preclude the Defendant from so defending, and such a result would be improper.

In its Motion to Stay, TrustBank has represented to this Court that the validity of the note and mortgage (together with the delivery of those documents) may be appropriately determined by the United States District Court in and for the Eastern District of Michigan. Defendant agrees with this position, and accordingly does not object to a stay of all proceedings arising out of this lawsuit. A stay should only be granted regarding all issues because the disposition of the proceeding in the United States District Court in and for the Eastern District of Michigan will have a *res judicata* effect on some issues in this case, and because a stay of less than all issues would deprive the Defendant of his right to trial by jury regarding the issues raised in his counterclaim.

STATEMENT OF FACTS

The abridged version of facts presented by TrustBank in its Motion to Sever and Stay are both disingenuous and insufficient to allow this Court to grant that motion. In addition, the Motion to Sever and Stay contains several material misstatements regarding the allegations made by the Defendant in his Affirmative Defenses and Counterclaim.

Beginning in 1984, Merrill Lynch Pierce Fenner & Smith Inc. collaborated with a number of other promoters (including TrustBank) to market, build, finance, own and operate a 474-unit luxury hotel condominium in Naples, Florida, ultimately known as "The Registry Hotel at Pelican Bay" (the "Hotel"). The factual details regarding this business transaction are set forth in the Complaint attached to the Motion to Sever and Stay with the caption *Richard C. Becherer, et al v Merrill Lynch Pierce Fenner & Smith Inc. et al* which was filed in the United States District Court in and for the Eastern District of Michigan — Southern Division (the "Class Action Lawsuit").

Sometime during 1984, the Defendant executed (but did not deliver to TrustBank) a series of documents (the "Documents"), wherein he agreed to purchase a condominium unit in the Hotel (the "Hotel Unit") upon its completion and its being ready for occupancy as such, but no later than the outside time limit established by the Federal Land Sales Full Disclosure Act and other applicable legislation. In the Documents, the Defendant made application to TrustBank for a mortgage loan to be secured by the Hotel Unit and his percentage of the commercial and common areas.

As alleged in the Affirmative Defenses, the Documents further provided that all subscription documents would be canceled, null and void in the event that TrustBank did not notify the Defendant in writing of its acceptance of his application within sixty (60) days of its submission. This subscription period purportedly terminated on October 31, 1984, and as of the date of this pleading, TrustBank has never provided its written acceptance of the loan application of the Defendant. The Defendant has alleged that the failure to provide this information automatically resulted in a cancellation of his agreement to purchase the Hotel Unit pursuant to the terms of the Documents executed by him.

As a further condition precedent to the obligation of the Defendant to purchase the Hotel Unit at such time as it was completed, the Hotel Unit at such time as it was completed, the Hotel was (as outlined in the Offering Memorandum) to be

completed on or prior to the second anniversary date of the execution of the Documents. Upon completion, the Hotel was to be capable of being occupied and fully operational for its intended purpose as a resort hotel facility. The Affirmative Defenses allege that the Hotel was not complete as of that date, and that this second condition precedent to the Defendant's obligation to purchase a Hotel Unit had not occurred or been satisfied within any applicable two-year period. Notwithstanding the failure of these two express conditions precedent, a purported "closing" was scheduled by TrustBank (without appropriate notice to or consent of the Defendant). Subsequent to the "closing," the Defendant was supplied with documents and representations from TrustBank stating that all conditions precedent had been satisfied or had occurred, and that the closing had taken place in accordance with the Documents and the Offering Memorandum.

A critical issue with respect to the Motion to Sever and Stay pertains to the very existence and validity of the note and mortgage purportedly sought to be foreclosed by TrustBank and the accompanying promissory note. These mortgage documents were previously executed and placed in escrow by the Defendant in 1984, but were never delivered to TrustBank. Instead, they were forwarded to an escrow agent to be delivered to TrustBank *only in accordance with the terms of the Documents and the Offering Memorandum*, subject to the satisfaction of all conditions precedent. The Defendant alleges in his Affirmative Defenses that the conditions precedent in the Offering Memorandum had not occurred, had not been performed, or otherwise had not been satisfied. As a result of the escrowed documents being wrongfully withdrawn in breach of fiduciary or other duties, no effective delivery was made to TrustBank and TrustBank holds no valid or enforceable mortgage on property owned by the Defendant which it now seeks to foreclose.

MEMORANDUM OF LAW

IT IS IMPROPER TO SEVER THE AFFIRMATIVE DEFENSES OF THE DEFENDANT IN THAT THE ISSUES RAISED BY HIM ARE INEXTRICABLY LINKED TO THE QUESTION OF TRUSTBANK'S RIGHT TO FORECLOSE ITS PURPORTED MORTGAGE

Contrary to the facts described by TrustBank in its Motion to Sever and Stay, the Defendant has alleged in his Affirmative Defenses specific wrongdoing by TrustBank in conjunction with the mortgage loan transaction between it and the Defendant. Further, and precisely to the point, the Defendant has alleged that TrustBank cannot carry its burden of proving its right to foreclose the mortgage it purportedly holds. The Defendant has also denied in his Answer to the Complaint to Foreclose Mortgage that TrustBank owns a valid, enforceable mortgage lien which it is entitled to foreclose. In denying these allegations, the Defendant affirmatively stated that

> ... The Note and Mortgage were inoperative instruments from their inception, continuing through the date of purported transfer to the Plaintiff [TrustBank]; it was therefore not possible for the Plaintiff [TrustBank] to acquire title thereto, all as more particularly described in the Affirmative Defenses and Counterclaim contained herein.

Paragraph 4 of Defendant's Answer to Complaint to Foreclose Mortgage.

There are ten affirmative defenses which have been raised by the Defendant to TrustBank's Complaint to Foreclose Mortgage. Of these ten defenses, four directly challenge TrustBank's right to bring this foreclosure action. The balance of the defenses allege that fraud permeated the mortgage loan transaction and that, as result, TrustBank is or should be equitably precluded from foreclosing its purported mortgage.

TrustBank relies heavily on the provisions of *Fla. Stat* §702.01 (1988). The current version of this statute was enacted

with an effective date of October 1988, and there are no cases reported after its enactment. It appears to be a codification of prior law which has zealously sought to preserve the constitutional right to trial by jury by mortgagors defending a foreclosure proceeding brought by mortgagees wherein a compulsory counterclaim is required to be raised. *E.g., American National Bank of Jacksonville v Norris,* 368 So.2d 897 (Fla. 1st D.C.A. 1979) (jury decided merits of counterclaim filed by mortgagor against mortgagee alleging breach of a construction loan agreement).

American National Bank of Jacksonville, supra, and the other cases relied upon by TrustBank in its argument do not provide support for TrustBank's position regarding severance of the Affirmative Defenses (although severance of the Counterclaim is appropriate). Rather, these cases uniformly hold that severance of claims which contain issues common to both claims (such as the Affirmative Defenses) should *not* be permitted while unrelated claims (such as the Counterclaim) may be severed. The issues raised by the Defendant in his Affirmative Defenses are common to those raised by TrustBank in its Complaint to Foreclose Mortgage, i.e., the validity and enforceability of the mortgage. Indeed, the Defendant's allegations go to the heart of TrustBank's right to foreclose the mortgage it purportedly owns.

In providing that all mortgages shall be foreclosed in equity, the Florida Legislature in *Fla. Stat.* §702.01 intended to continue the traditional rules of law with regard to the discretion of a trial court sitting in equity, including the enforcement of the traditional equitable notion that one who seeks equity must do equity. Sitting as a court in equity, this Court has the discretion to refuse to grant a prayer for foreclosure of a mortgage if doing so would be inequitable. *Creamer v Aultman,* 445 So.2d 382 (Fla. 1st D.C.A. 1984). A traditional reason for not allowing a mortgagee to foreclose a mortgage exists when the mortgagor alleges fraud or collusion as a defense to a mortgage foreclosure suit. *Ruff v Guaranty Title and Trust Co.,* 126 So. 383 (Fla. 1930).

In this case, the severance of the claims held by TrustBank and the Affirmative Defenses of the Defendant would not only

result in litigating common issues on multiple occasions (ignoring the collateral estoppel and *res judicata* impact of severance, as discussed below), but severance would also work an extreme hardship on the Defendant. For reasons beyond his control, the Defendant holds legal title to the Hotel Unit, has suffered out of pocket damages and has incurred other fees and costs while attempting to unravel this problem. The foregoing were not incurred in ratification of an unauthorized "closing," but were incurred in order to protect the Defendant pending the determination of the rights and responsibilities of all parties.

In any event, the issue of legal title is irrelevant at this point in the these proceedings. The only issue before this Court (excluding those issues raised in the Counterclaim) is whether TrustBank can establish its right to foreclose the purported mortgage which it claims to hold. In making this determination, the Defendant must be able to effectively defend against any claims of validity and enforceability, including the ability to allege and prove the Affirmative Defenses. Thus, the Defendant consents to the severance of the Counterclaim, but respectfully requests this Court to deny the request of TrustBank to sever the Defendant's Affirmative Defenses.[1]

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[1]TrustBank relies on *Adams v Citizens Bank of Brevard,* 248 So.2d 682 (Fl. 4th D.C.A. 1971) as providing authority that the Counterclaim and Affirmative Defenses of the Defendants should be severed and that the nonjury foreclosure trial should proceed prior to the jury trial. This reliance is misplaced, in that the Court in that case held that the trial court could determine nonjury only "... those factual issues which were unrelated to the issues upon which counterclaimants were entitled to jury trial." *Adams, supra* at 685. Thus, even if severance is granted with respect to the Counterclaim alone or both the Counterclaim and the Affirmative Defenses, TrustBank's foreclosure proceeding would have to be stayed pending determination and resolution by jury of those issues upon which Defendants are entitled to jury trial.

ALL CLAIMS ARISING OUT OF THESE PROCEEDINGS SHOULD BE STAYED DURING THE PENDENCY OF THE CLASS ACTION LAWSUIT

The conclusion reached by TrustBank in its Motion to Sever and Stay (which is supported by judicial precedent) is correct in that this Court may, in the interest of state and federal comity, stay these proceedings until the Class Action Lawsuit is tried and decided. A stay is particularly appropriate where, as here, the outcome of the Class Action Lawsuit (in which TrustBank is a defendant) would have *res judicata* effect on the Counterclaim and Affirmative Defenses of the Defendant. The test for staying a cause of action pending simultaneously with another action instituted in a separate court is that the "... identity of the matters involved must be such that a judgment in the first suit could be pleaded in part as a former adjudication." *Horter v Commercial Bank & Trust*, 126 So. 909, 912 (Fla. 1930). Any judgment in the Class Action Lawsuit will act as an estoppel to TrustBank and the Defendant from litigating issues common to both causes of action which are actually litigated and decided in the prior action.

Moreover, allowing the foreclosure action to proceed in advance of the Class Action Lawsuit (or the Affirmative Defenses) would severally prejudice the Defendant in the Class Action Lawsuit. One form of relief which has been requested in the Class Action Lawsuit is rescission voiding the note and mortgage purportedly held by Trustbank. Presented with common issues as raised by TrustBank and the Defendant in their respective pleadings, the United States District Court for the Eastern District of Michigan has the authority, pursuant to the Securities Act of 1933, the Securities and Exchange Act of 1934 (as to which the federal courts have exclusive jurisdiction and this Court may not assume concurrent jurisdiction), the Federal Interstate Land Sales Full Disclosure Act and other applicable authority to take actions which can and will affect the validity of the note and mortgage pertaining to the Hotel Unit, as well as the notes and mortgages of many other hotel unit owners situated similarly to the Defendant.

Accordingly, if this Court is inclined to stay any of these proceedings, it must stay all of these proceedings. Only in that way can it protect all parties from the res judicata or collateral estoppel effect which resolution of the Class Action Lawsuit will provide. In addition, because the issues in both lawsuit are inextricably intertwined (as are the issues in the claims of Defendant and TrustBank in this case), the only way to preserve the Defendant's right to trial by jury is to stay the foreclosure proceeding pending resolution of both the Class Action Lawsuit and the claims raised by the Defendant in this suit as to which a jury trial is afforded as of right.

Finally, the anomaly painted by TrustBank regarding the Defendant's justification of seeking alternative relief is disingenuous. TrustBank suggests that the "... only way Defendants could seek to justify such a result would be the desire to await the outcome of their actions in Michigan — to see whether they are entitled to rescission of their unit purchase, note and mortgage — and then, if they lose, to take the opportunity to reinstate their mortgage." Motion to Sever and Stay at 6. This argument ignores that it is TrustBank and not the Defendant which has requested severance and stay of these proceedings.

Although this argument may initially have some appeal, on closer scrutiny it becomes obvious that it is a paper tiger. More importantly, this argument masks the fact that it is TrustBank, and not the Defendant, that seeks procedural advantage. By filing this action, TrustBank is attempting to avoid the Class Action Lawsuit in which it is a named party defendant. Even if TrustBank succeeds in this procedural jousting before this Court, it must still defend itself in the Class Action Lawsuit wherein all notes and mortgage purportedly held by it in connection with the Hotel may be voided. If the United States District Court, pursuant to its exclusive jurisdiction and the authority granted to it in the Securities and Exchange Act of 1934 (including Rule 10b-5 promulgated thereunder), determines that rescission is an appropriate remedy, that decision *will* affect the validity of the note and

mortgage in this action. Therefore, a complete stay is appropriate and should be granted by this Court.

CONCLUSION

As a court in equity, this Court is required to sever equitable and legal claims in a foreclosure proceeding so long as those claims are not related, but are separate and independent. Therefore, it is appropriate to sever the Counterclaim, although it is within the discretion of this Court to refuse to do so in order to achieve greater judicial efficiency in the resolution of these issues. However, the claims raised by the Defendant in the Affirmative Defenses are so inextricably linked to the issues raised in TrustBank's Complaint that it is not appropriate for this Court to sever those claims.

TrustBank must prove its case. It must carry its burden of establishing the validity and enforceability of the note and mortgage it purportedly holds, and the Defendant must be given the opportunity to defend itself from TrustBank's allegations. While severance of the Affirmative Defenses would defeat the ability of the Defendant to defend itself, a stay of these proceedings would not prejudice TrustBank or the Defendant. A stay of all (but not some) of the proceedings in this case is appropriate and would properly accommodate the interests of comity, would allow the *res judicata* and collateral estoppel effect of the Class Action Lawsuit to benefit the appropriate parties at its conclusion and would benefit this Court through the more efficient administration of justice.

Finally, if any proceedings in this lawsuit are stayed, all proceedings must be stayed pending resolution of the legal claims raised in the Affirmative Defenses and Counterclaim of the Defendant in order to preserve his right to trial by jury on all issues so triable.

WHEREFORE, the Defendant respectfully requests this Court to deny the motion to sever his Affirmative Defenses, although he has no objection to severing the Counterclaim. In

addition, the Defendant respectfully requests this Court to stay the entire proceedings pending resolution of the Class Actin Lawsuit or, at a minimum, pending resolution by jury of the legal claims raised by the Defendant in his Affirmative Defenses and Counterclaim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this document has been filed with the Clerk of the Courts and a true and correct copy of the foregoing has been furnished by U.S. Mail this day of February, 1990 to Sherry Dickman, Esq., Penthouse, Atico Financial Center, 200 Southeast First Street, Miami, Florida 33131.

_____
Thomas R. Grady, Esq.